APPENDIX A

Opinion of the United States
Court of Appeals for the Second Circuit
December 28, 1992
(reported at 982 F.2d 778 (2d Cir. 1992))

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 299 -- August Term, 1992

Peter Hurwitz,
Plaintiff-Appellant,

v.

Joan Lear Sher,
Defendant-Appellee.

[Appearances Omitted]

OAKES, Circuit Judge:

Plaintiff Peter Hurwitz ("Peter") appeals from a grant of summary judgment in favor of the defendant, Joan Lear Sher. Hurwitz v. Sher, 789 F. Supp. 134 (S.D.N.Y. 1992). The district court held that a spouse's antenuptial agreement does not constitute an effective waiver under the Employee Retirement Income Security Act ("ERISA") of death benefits under an employee benefit plan. Peter argues that he is his deceased father's sole beneficiary under the

Algonquin Press, Inc. Employees Profit Sharing Plan (the "Plan") and that Sher effectively waived any claims to spousal benefits through the antenuptial agreement (the "Agreement"). We affirm.

I. Background

The deceased, David Hurwitz ("David"), was an attorney and chief executive officer of Algonquin Press, Inc. At the time of his death, David was the sole participant in the Plan, a qualified profit sharing plan subject to the provisions of ERISA and the qualified plan rules of the Internal Revenue Code ("IRC"). In compliance with section 205 of ERISA, 29 U.S.C. § 1055 (1988 & Supp. II 1990), and IRC § 417(A) (1988),[1] the Plan provides that the beneficiary of death benefits shall be the participant's spouse. For a spousal waiver of these rights to be effective, the spouse must execute a signed document which acknowledges the effect of the waiver and is witnessed by a notary public or a plan representative.

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[1] This section of the IRC parallels the ERISA language in establishing the requirements for benefit plans to qualify for tax exempt status. Authority to issue regulations concerning the parallel provisions has been lodged in the Secretary of the Treasury. See Reorg. Plan No. 4 of 1978 § 101, 3 C.F.R. 332 (1978), reprinted in 1978 U.S.C.C.A.N. 9814 (transferring authority with regard to certain ERISA provisions from Secretary of Labor to Secretary of Treasury). The IRS's interpretations for the statute are embodied in Treasury Regulations.

Before his marriage to Sher, David had been married twice. In 1988, he had his second wife execute a waiver of benefits which complied with the conditions stated in the Plan and required under ERISA. Peter, David's son by his first wife, was designated as the beneficiary. David married the defendant, Sher, in 1990.

Before marrying David, Sher signed the Agreement, foregoing any rights to her future husband's property upon his death. The Agreement provided, in part, that "each party hereby waives and releases to the other party and to the other party's heirs, executors, administrators and assigns any and all rights and causes of action which may arise by reason of the marriage between the parties . . . with respect to any property, real or personal, tangible or intangible . . . now owned or hereafter acquired by the other party, as fully as though the parties had never married . . . ."

Nine months after marrying Sher, David died. Peter is David's sole heir in light of the antenuptial agreement and David's will.

On May 15, 1991, Peter commenced this action against Sher in Supreme Court, New York County, seeking a declaration that he is the sole recipient of Plan benefits. On May 23, 1991, Sher removed the action to the Southern District of New York, pursuant to 28 U.S.C. § 1441(a) (1988), as federal statutes govern the disposition of this case. On June 4, 1991, Sher filed a counterclaim seeking a declaration pursu-

ant to 28 U.S.C. § 2201 (1988) that (1) under the applicable provisions of ERISA, the Internal Revenue Code, the Treasury Regulations and the Plan, she, as the spouse of the deceased, is the rightful beneficiary of the Plan; and (2) that the provisions contained in the Agreement constitute neither a valid nor an effective waiver of her rights as a beneficiary of the Plan. Both parties moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The district court granted Sher's motion. For the reasons set forth below, we affirm.

II. Discussion

Summary judgment is appropriate if, in light of the evidence presented, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). The moving party bears the burden of demonstrating the absence of a genuine issue of material fact, Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). In making this determination, we must view the facts in the most favorable light for the nonmoving party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). Here, the parties agree that no material facts are in dispute. The only source of dispute is the parties' disagreement over the effectiveness of the antenuptial agreement as a waiver of spousal benefits under the Plan.

As a preliminary matter, Peter argues that New York law should provide guidance as to the

outcome of this case. It does not. ERISA's preemption provision is very broad: ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title." 29 U.S.C. § 1144(a) (1988). Under this provision, pension plan regulation is made an exclusively federal concern. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 44-46 (1987). Peter argues that ERISA is silent on the effectiveness of antenuptial agreements as spousal waivers, justifying an application of state law.[2] See

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[2] According to Peter, the district court also overlooked a provision of ERISA which would support his argument. ERISA provides a limited exception to the general prohibition on alienation of benefits for "qualified domestic relations orders" ("QDROs"). See U.S.C. § 1144(b)(7) (1988). This provision ensures that such family obligations as alimony or child support will be payable out of benefits. Plaintiff argues that this exception applies because the decree of the New York Surrogate's Court, which granted him letters of administration to administer his father's estate, is in fact a QDRO.

Section 206(d)(3) of ERISA defines a QDRO, in pertinent part, as follows:

(B) For purposes of this paragraph --

. . .

(ii) the term "domestic relations order" means any judgment, decree, or order (including approval of a property settlement agreement) which --

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> (I) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and
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> (II) is made pursuant to a State domestic relations law (including a community property law).

(C) A domestic relations order meets the requirements of this subparagraph only if such order clearly specifies --

> (i) the name and last known mailing address . . . of the participant and . . . each alternate payee . . .,
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> (ii) the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined.
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> (iii) the number of payments or period to which such order applies, and
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> (iv) each plan to which such order applies.

29 U.S.C. § 1056(d)(3) (1988 & Supp. II 1990).

The decree of the Surrogate's court in this case does not meet the statutory requirements for a QDRO

Amato v. Western Union Intl., Inc., 773 F. 2d 1402, 1419 (2d Cir. 1985), cert. dismissed, 474 U.S. 1113 (1986) (although ERISA is governed by federal law, when ERISA is silent, courts may look to state law). This argument is without merit. Although ERISA does not speak specifically to the issue of antenuptial agreements, it does set out quite plainly the requirements for an effective spousal waiver of benefits. 29 U.S.C. § 1055.

In order to determine which party is entitled to receive benefits under the Plan, we must first consider the statutory language of ERISA. Pilot Life Ins. Co., 481 U.S. at 57. ERISA was amended in 1984 by the Retirement Equity Act (the "REA") to ensure that a participant's spouse receives survivor benefits from a retirement plan even if the participant dies before reaching retirement age. Pub. L. 98-397, 98 Stat. 1426 (1984). The REA established clear criteria for a waiver of benefits by the spouse:

(2) Each plan shall provide that an election [of a waiver] . . . shall not take effect unless --

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under paragraph (C) nor does it relate to the fundamental purposes of this provision -- to protect a spouse or former spouse's rights to child support, alimony payments or marital property. The decree merely deals with the administration of the decedent's estate. Consequently, Peter's argument fails.

> (A)(i) the spouse of the participant consents in writing to such election, (ii) such election designates a beneficiary (or form of benefits) which may not be changed without spousal consent (or the consent of the spouse expressly permits designations by the participant without any requirement of further consent by the spouse), and (iii) the spouse's consent acknowledges the effect of such election and is witnessed by a plan representative or a notary public.

29 U.S.C. § 1055(c) (1988). IRC § 417 (a) (1988) states the same requirements.

The Agreement did not satisfy these unambiguous statutory specifications. As the district court noted, the antenuptial agreement did not designate a beneficiary and did not acknowledge the effect of the waiver as required by ERISA. Hurwitz, 789 F. Supp. at 137. The district court also relied on the fact that Sher had not been a spouse when she signed the agreement.[3] Id.

We do not find the district court's construction to be erroneous. The unambiguous statutory language controls except in those "rare cases [in which] the literal application of a statute will produce

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[3]We reserve judgment on whether the antenuptial agreement might have operated as an effective waiver if its only deficiency were that it had been entered into before marriage.

a result demonstrably at odds with the intentions of its drafters." Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982). Peter argues that the district court's reading of the statute is indeed "demonstrably at odds" with the legislative intent. Specifically, he notes that Congress evinced a concern with protecting the interests of nonparticipant spouses who had no retirement benefits of their own but who had contributed in a nonfinancial way to the family unit. Further, Peter argues that the legislative history betrays no intent to disinherit the children of previous marriages. Thus, he asserts, the REA must be construed to allow waivers through antenuptial agreements.

This argument, however, must fail. The Congressional sponsors of this provision did indeed intend to protect long-term homemakers' rights to their spouses' retirement benefits. See S. Rep. No. 98-575, 98th Cong., 2d Sess. 1 (1984), reprinted in 1984 U.S.C.C.A.N. 2547, 2547 (REA designed to provide for greater equity in pension plans for workers and spouses "by taking into account changes in work patterns, the status of marriage as an economic partnership, and the substantial contribution to that partnership of spouses who work both in and outside the home . . . .") Furthermore, it is likely that the Congressional sponsors did not anticipate the situation at issue here, in which two older, wealthy individuals relied on an antenuptial agreement to protect their children's inheritances. However, we cannot say that just because Congress intended to protect spouses who have been long-term

partners, it meant to permit the casual disenfranchisement of newly-weds. As no legislative intent can be discerned to exclude such spouses from the clear provisions of the statute, we will not exempt them by fiat.

Moreover, the alternative interpretation suggested by Peter would entail great practical difficulties which cast doubt on his claim that it is what Congress intended. His argument if accepted would require the courts to examine the individual circumstances behind each assertion of spousal waiver to assess whether the parties fit the Congressional model. Perhaps, in this case, the outcome is inequitable if it defeats David's alleged intent to preserve all his assets for his son and does not serve the Congressional purpose of protecting a long-term spouse from being divested of benefits. In other cases, however, an antenuptial agreement might be signed at the beginning of a long marriage partnership. In these cases, making such an agreement effective as a waiver under ERISA would cause the same problems that the Congressional sponsors were trying to alleviate. As one court has said in a similar case,

> It may seem inequitable that Mr. Jensen should be deemed the beneficiary if Mrs. Jensen's actual intent was that the benefits go to her daughter. The Retirement Equity Act says what it says, however, and so does the plan document. We must follow their provisions. It is neither unlawful nor unreasonable for

> the terms of a benefit plan to specify that the intent of a plan participant with respect to the designation of a beneficiary must be manifested in a writing that meets the requirements of the statute and that has been filed with the plan trustee. Such a requirement represents a simple and effective safeguard against fraud, and it reduces the likelihood that the plan trustee or administrators will have to make costly -- and perhaps inconclusive -- inquiries into the subject state of mind of deceased plan participants.

Howard v. Branham & Baker Coal Co., 968 F.2d 1214 (table), No. 91-5913, reported in full at 1992 U.S. App. LEXIS 16247, at *10-11 (6th Cir. July 6, 1992) (unpublished).

Treasury Regulations § 1.401(a)-20 (1991) further support the district court's decision. "Because the IRS is one of the agencies charged with administering ERISA, its interpretations of the statute are entitled to great deference." Rose v. Long Island R.R. Pension Plan, 828 F.2d 910, 918 (2d Cir. 1987), cert. denied, 485 U.S. 936 (1988). Thus, the regulations "`must be sustained unless unreasonable and plainly inconsistent with the revenue statutes,' and 'should not be overruled except for weighty reasons.'" Bingler v. Johnson, 394 U.S. 741, 750 (1969) (quoting Comm'r v. South Texas Lumber Co.,, 333 U.S. 496, 501 (1948).

The Treasury Regulations specifically address antenuptial agreements:

> Q-28 Does consent contained in an antenuptial agreement or similar contract entered into prior to marriage satisfy the consent requirements of sections 401(a)(11) and 417 (of The Internal Revenue Code)?
>
> A-28 No. An agreement entered into prior to marriage does not satisfy the applicable consent requirements, even if the agreement is executed within the applicable election period.
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> . . . .
>
> Q-32 What rules govern a participant's waiver of the spousal benefit of section 401(a)(11)(B) (of The Internal Revenue Code)?
>
> A-32 (a) Application. In the case of a defined contribution plan . . . a participant may waive the spousal benefit of section 401(a)(11)(B)(iii) if the conditions of paragraph (b) are satisfied . . . .
>
> (b) Conditions. . . . (T)he participant's waiver of the spousalbenefit must state the specific nonspouse beneficiary who will receive

> such benefit. The waiver is not required to specify the optional form of benefit. The participant may change the optional form of benefit, but not the nonspouse beneficiary, without obtaining the spouse's consent.

Treas. Reg. § 1.401(a)-20 (1991).[4]

We are not alone in finding that antenuptial agreements lacking ERISA waiver requirements do not constitute effective waivers under ERISA. See Howard v. Branham & Baker Coal Co., 1992 U.S. App. LEXIS 16247 at *6-7 (antenuptial agreement does not constitute valid consent under ERISA); Zinn v. Donaldson Co., Inc., 799 F. Supp. 69, 73 (D. Minn. 2992) (same); Nellis v. Boeing Co., 15 Employee Benefits Cas. (BNA) 1651, 1992 U.S. Dist. LEXIS 8510 at *12-13 (D. Kan. 1992), (same).

Peter has found only one case which has reached the opposite conclusion. In In re Estate of Hopkins, 214 Ill. App. 3d 427, 574 N.E.2d 230, appeal denied, 141 Ill. 2d 542, 580 N.E.2d 115 (1991), a state appeals court held that an antenuptial agreement operates as an effective waiver of spousal benefits

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[4] Some of the Treasury Regulations are written in question and answer form. The novel format does not alter their weight as regulations. See, e.g., Branch v. G. Bernd Co., 955 F.2d 1574, 1581 & n.6 (11th Cir. 1992); Communications Workers of America v. NYNEX Corp., 898 F.2d 887, 889 (2d Cir. 1990).

under ERISA. The district court in this case properly distinguished Hopkins, noting that the Illinois court had erroneously relied on Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown, 897 F. 2d 275 (7th Cir.), cert. denied, ___ U.S. ___, 111 S.Ct. 67 (1990). The Hopkins court read Fox Valley to hold that "a surviving spouse can waive her interests in a plan under the REA without following (the) specific waiver requirements [of ERISA as amended in 1984]." Hopkins, 574 N.E. 2d at 235. Fox Valley, however, addressed the question of whether a divorced spouse who was designated as a beneficiary prior to divorce may still receive death benefits despite a waiver provision in a divorce settlement. Fox Valley, 897 F.2d at 278. A divorced spouse, unlike a current spouse, is not protected by the explicit terms of the statute. The Seventh Circuit held therefore that a divorced spouse may waive benefits without following the explicit requirements of the statue. The Hopkins court erred by applying the same logic to current spouses. In reaching its decision, the Illinois court failed to consider the explicit requirements of ERISA with respect to spousal waivers. Moreover, the court in Hopkins disregarded the Treasury Regulations as merely "interpretive" and not binding. As noted above, these Regulations must be accorded some deference and may not be dismissed outright. See Bingler v. Johnson, 394 U.S. 741, 749-50 (1969).

Peter makes one further argument, this time in equity. In light of David's alleged intent to divest Sher of pension benefits, he argues that Sher should be forced to conform to the terms of the antenuptial

agreement. This contention, however, is merely an attempt to evade the clear statutory requirements. Cf. Zinn, 799 F. Supp. at 74 (rejecting same argument). See also Callahan v. Hutsell, Callahan & Buchino, P.S.C. Revised Profit Sharing Plan, No. C91-0616-L(J), slip op. at 9 (W.D. Ky. Feb 18, 1992) (refusing to order beneficiary to sign a waiver after her spouse's death despite the fact that she had previously agreed in an antenuptial agreement to sign such a waiver). We feel it would be inappropriate to plumb the decedent's ambiguous intentions when the statutory requirements are so clear.

III. Conclusion

The Agreement in this case did not conform to the specific requirements set forth in section 205 of ERISA, 29 U.S.C. § 1055. For this reason, we affirm the decision of the district court.

APPENDIX B

Opinion of the United States District
Court for the Southern District of New York
April 8, 1992
(reported at 789 F.Supp. 134 (S.D.N.Y. 1992))

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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PETER HURWITZ,

Plaintiff,

91 Civ. 3486(RPP)

-against-

OPINION AND ORDER

JOAN LEAR SHER,

Defendant.
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APPEARANCES

[omitted]

ROBERT P. PATTERSON, JR., U.S.D.J.

On May 15, 1991 Plaintiff Peter Hurwitz ("Plaintiff") commenced this action against Defendant

Joan Lear Sher ("Defendant") in Supreme Court, New York County seeking a declaration that he is the sole beneficiary of his father (the "Deceased")'s interest in the Algonquin Press, Inc. Employees Profit Sharing Plan (the "Plan"). On May 23, 1991 Defendant removed the action to this Court pursuant to 28 U.S.C. § 1331.[1] On June 4, 1991 Defendant filed a counterclaim seeking a declaration pursuant to 28 U.S.C. § 2201 that: (1) under the applicable provisions of the Employee Retirement Income Security Act ("ERISA"), the Internal Revenue Code, the Treasury Regulations and § 6.2(d) of the Plan, she, as the spouse of the Deceased, is the rightful beneficiary of the Plan; and (2) that the provisions contained in an antenuptial agreement (the "Agreement") constitute neither a valid nor an effective waiver of her rights as beneficiary of the Plan. The parties each have moved for an order granting summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. For the reasons set forth below, Defendant's motion is granted, and Plaintiff's motion is denied.

BACKGROUND

The Deceased, an attorney and chief executive officer of Algonquin Press, Inc., was the sole participant in the Plan, an ERISA employee benefit plan qualified under § 401(a) of the Internal Revenue Code. The applicable provisions of the Plan provide that with respect to death benefits, the beneficiary

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[1] The issues involved are governed by federal statutes.

shall be the participant's spouse, and in waiving any of these rights the spouse must acknowledge the effect of such waiver. These provisions of the Plan, §§ 6.2 (d) and (e), were added on November 17, 1986 to comply with 29 U.S.C. § 1055 of ERISA and 26 U.S.C. § 401 of the Internal Revenue Code. As amended, the Plan provisions provide the following:

> (d) The Beneficiary of the death benefit payable pursuant to this Section shall be the Participant's spouse. Except, however, the Participant may designate a Beneficiary other than his spouse if:
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> (i) the spouse has waived his or her right to be the Participant's Beneficiary, or
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> (ii) the Participant has no spouse, or the spouse cannot be located.
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> • • •
>
> (e) Any consent by the Participant's spouse to waive any rights to the death benefit must be in writing, must acknow-ledge the effect of such waiver, and be witnessed by a Plan representative or a notary public.

Sher Aff. in Supp., Exh. 5 at 3-4.

In 1988 the Deceased divorced his second wife.[2] On July 21, 1988, in connection with the divorce settlement but apparently prior to the divorce, the Deceased's second wife executed a spousal consent to the designation of Plaintiff as the beneficiary of the Deceased's interest in the Plan, thereby waiving her right to a death benefit provided under the Plan. The designation provided, "I consent to the selection of primary beneficiary indicated by my spouse in this form. I understand that I am waiving my right to a death benefit provided under the Plan(s) in accordance with Federal Law by signing this consent." Sher Aff. in Supp., Exh. 3. This waiver complied with the applicable provisions of the Plan and ERISA. The written designation of Plaintiff as the beneficiary also contained the following provision signed by the Deceased:

> I understand that if my marital status changes, I am to provide information relating to that change to the Plan Administrator as any change in my marital status could affect the benefits to be paid as a result of my death.
>
> I understand that if I am married at the time of my death, my surviving spouse will receive the surviving spouse's death benefit from the Plan(s) as required by

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[2] The Deceased's first wife, from whom he was divorced in 1966, is the mother of his only child, the Plaintiff in this action.

> law UNLESS she/he has completed and signed the Spousal Consent below and had such Consent witnessed by a Notary Public or the Plan Administrator.

Id. emphasis in original).

Defendant and the Deceased were married on January 7, 1990. Prior to their marriage, they executed an antenuptial agreement on December 27, 1989, which provided, in part, that "each party hereby waives and releases to the other party . . . any and all rights and causes of action which may arise by reason of the marriage between the parties . . . with respect to any property, real or personal, tangible or intangible now owned or hereafter acquired by the other party as fully as though the parties had never married." Sher Aff. in Supp., Exh. 4, ¶ 3. Algonquin Press, Inc. never received a new beneficiary designation from the Deceased, nor any information relating to his change in marital status. Moreover, Defendant, as the Deceased's new spouse, never signed a designation form consenting to the designation of a non-spouse beneficiary (i.e. the Plaintiff).

On October 5, 1990 the deceased died, leaving Defendant as his surviving spouse and, in view of the antenuptial agreement, Plaintiff as his sole heir. Plaintiff was appointed administrator of the estate, there being no last will and testament admitted to probate. Defendant consented to the appointment, reserving her rights with respect to her claim to the

Deceased's interest in the Plan. Sher Aff. in Supp. ¶ 15.

DISCUSSION

Summary judgment is appropriate if the evidence offered demonstrates that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). The burden rests on the moving party to demonstrate the absence of a genuine issue of material fact, Adickes v. S. H. Kress & Co., 398 U.S. 144, 157 (1970), and the Court must view the facts in the light most favorable to the non-moving party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). Here, the parties agree that there is no material issue of fact;[3] however, each party claims that as a matter of law, it is the proper beneficiary of the Plan. At issue is whether the antenuptial agreement signed by Defendant constituted an effective waiver of her rights to receive the Deceased's benefits under the Plan.

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[3] Defendant claims that both Plaintiff and the Deceased told her that she would be the beneficiary of the Plan, in spite of the antenuptial agreement. Sher Aff. in Supp. ¶ 14. The assertion, which Plaintiff disputes, is not material to the Court's determination of the instant motions, nor is it considered relevant thereto.

Defendant claims that under the governing ERISA and Internal Revenue Code provisions the execution of the Agreement eleven days prior to her marriage to the Deceased does not constitute an effective waiver of the benefits to which she would otherwise be entitled under the Plan for three reasons: (1) it was not signed by a spouse; (2) it was in a writing which did not designate a beneficiary; and (3) it did not acknowledge the effect of such consent. These three elements are required under §§ 6.2 (d) and (e) of the Plan as well as under 29 U.S.C § 1055(c) of ERISA and 26 U.S.C. § 417(a) of the Internal Revenue Code.

The ERISA preemption provision is an expansive one: ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title." 29 U.S.C. § 1144. This language is designed to establish pension plan regulation as an exclusively federal concern. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 45 (1987). Thus, in considering a designation of the proper beneficiary to an ERISA plan, this Court first should look to the statute itself or any existing federal common law in resolving the instant case.[4]

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[4] It appears that this question, whether an antenuptial agreement constitutes a valid waiver of a current spouse's rights as a beneficiary under an ERISA-qualified pension plan, is an issue of first impression in the federal courts. Cf. Fox Valley & Vicinity Construction Workers Pension Fund v.

The applicable ERISA provision, 29 U.S.C. § 1055(c), describes the nature of the consent required to waive spousal rights to employee plan benefits:

> (2) Each plan shall provide that an election [of a waiver] under paragraph (1)(A)(i) shall not take effect unless--
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> > (A)(i) the spouse of the participant consents in writing to such election, (ii) such election designates a beneficiary (or form of benefits) which may not be changed without spousal consent (or the consent of the spouse expressly permits designations by the participant without any requirement of further consent by the spouse), and (iii) the spouse's consent acknowledges the effect of such election and is witnessed by a plan representative or a notary public.

Similarly, 26 U.S.C. § 417(a) of the Internal Revenue Code provides parallel requirements:

> (2) **Spouse must consent to Election.** Each plan shall provide that an election (of a waiver) under paragraph (1)(A)(i) shall not take effect unless--

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Brown, 897 F.2d 275 (7th Cir.), cert. denied, 111 S. Ct. 67 (1990) (discussing rights of divorced spouse under deceased husband's ERISA-qualified pension plan).

> (A)(i) the spouse of the participant consents to such election (ii) such election designates a beneficiary (or a form of benefits) which may not be changed without spousal consent (or the consent of the spouse expressly permits designations by the participant without any requirement of further consent by the spouse, and (iii) the spouse's consent acknowledges the effect of such election and is witnessed by a plan representative or a notary public, or
>
> (B) It is established to the satisfaction of a plan representative that the consent required under subparagraph (A) may not be obtained because there is no spouse, because the spouse cannot be located, or because of such other circumstances as the Secretary may by regulations prescribe.

Interpretation of a statute must begin with the statute's language. Mallard v. United States Dist. Court for the S. Dist. of Iowa, 109 S. Ct. 1814, 1818 (1989). Here, both 29 U.S.C. § 1055(c) and 26 U.S.C. § 417(a) require consent to the waiver to be provided by the participant's spouse. When Defendant signed the Agreement, she was the Deceased's fiancee, not his spouse. Therefore, Defendant, as a fiancee, could not effectively waive her rights within the meaning of 29 U.S.C. § 1055(c) and 26 U.S.C. § 417(a).

These provisions of ERISA and the Internal Revenue Code also require that the waiver designate a specific beneficiary of the Plan. Here, the

Agreement fails again by not specifying a non-spouse beneficiary who will receive the benefits. Similarly, the Agreement is not an effective waiver because it does not acknowledge the effect of the waiver, as required by 29 U.S.C. §1055(c) and 26 U.S.C. § 417(a).

Treasury Regulation § 1.401(a)-20 provides additional support for Defendant's position. Question and Answer #28 and #32 apply specifically to the instant action:

> Q-28 Does consent contained in an antenuptial agreement or similar contract entered into prior to marriage satisfy the consent requirements of sections 401(a)(11) and 417 [of The Internal Revenue Code]?
>
> A-28 No. An agreement entered into prior to marriage does not satisfy the applicable consent requirements, even if the agreement is executed within the applicable election period.
>
> Q-32 What rules govern a participant's waiver of the spousal benefit under section 401(a)(11)(B) [of The Internal Revenue Code]?
>
> A-32 (a) **Application.** In the case of a defined contribution plan . . . a participant may waive the spousal benefit of section 401(a)(11)(B)(iii) if the conditions of paragraph (b) are satisfied . . . .
>
> (b) **Conditions** . . . Thus, the participant's waiver of the spousal benefit must state the

> specific nonspouse beneficiary who will receive such benefit. The wavier is not required to specify the optional form of benefit. The participant may change the optional form of benefit, but not nonspouse beneficiary, without obtaining the spouse's consent.

Treas. Reg. §1.401(a)-20 (1991)

The Treasury Regulations attempt to interpret Congressional intent behind statutory language. They "must be sustained unless unreasonable and plainly inconsistent with the revenue statutes, and should not be overruled except for weighty reasons." Bingler v. Johnson, 394 U.S. 741, 749-750 (1969) (emphasis added). Here, the Treasury Regulations are neither unreasonable nor inconsistent with the statutory language. Moreover, Plaintiff has advanced no weighty reasons mandating their reversal.[5] Accordingly, they should not be overruled.

Notwithstanding the above statutes and regulations, Plaintiff argues that state law governs the resolution of this case. In support of his position,

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[5] Plaintiff argues that upholding the Regulation would result in Defendant receiving benefits which she had no expectation of receiving. As mentioned supra, whether Defendant was told she was the beneficiary of the Plan is disputed. Under ERISA defendant's expectations as to her rights under the Plan, however, are irrelevant. Instead, it is her knowing waiver that is relevant.

he relies on In re Estate of Hopkins, 574 N.E.2d 230, appeal denied, 580 N.E.2d 115 (Ill. App. Ct. 1991). However, as the court in Hopkins conceded, federal law governs this issue.[6] A state court interpretation of the applicable federal law is not binding on this Court. Furthermore, in Hopkins, the Illinois state court erroneously relied on Fox Valley & Vicinity Construction Workers Pension Fund v. Brown, 897 F.2d 275 (7th Cir.), cert. denied, 111 S. Ct. 67 (1990). The court read Fox to hold that, "a surviving spouse can waive her interests in a plan without following [the] specific waiver requirements [of ERISA as amended in 1984]." Hopkins, 574 N.E.2d at 235 (emphasis added). However, the issue in Fox Valley was whether a divorced spouse who was designated as a beneficiary prior to the divorce would still receive a death benefit despite a provision in a divorce settlement waiving any rights to the benefit. The Seventh Circuit noted that both ERISA and the existing body of federal common law interpreting ERISA are silent on the issue of what constitutes a proper waiver in a divorce agreement. Fox Valley, 897 F.2d at 280. Therefore, it was free to turn to state law to conclude that the settlement did in fact constitute a valid waiver of the benefits under the ERISA plan.

The instant case involves a current spouse who has statutorily protected rights. Moreover, 29 U.S.C.

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[6] Despite this acknowledgement, the Illinois court found that the antenuptial agreement in that case did constitute a valid waiver. Hopkins, 574 N.E.2d at 235.

§ 1055(c) and 26 U.S.C. § 417(a) are not silent as to the proper form of consent necessary for a spouse to waive plan benefits. Instead, they outline specific requirements which must be fulfilled for a spouse to effectuate a valid waiver. As described above, these requirements were not met by the antenuptial agreement between the Deceased and Defendant. Accordingly, the Agreement does not constitute an effective waiver of Defendant's rights to the Plan's benefits, and Defendant is the proper beneficiary of the Plan.

CONCLUSION

For the foregoing reasons, Plaintiff's motion is denied, and Defendant's motion is granted. This case is ordered closed.

IT IS SO ORDERED.

Dated: New York, New York
April 8, 1992

Robert P. Patterson, Jr.
U.S.D.J.